(5)

No. 05-1272

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

In the

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP.
AND BOEING NORTH AMERICAN, INC.

Petitioners,

v.

UNITED STATES OF AMERICA

AND

UNITED STATES *EX REL.* JAMES S. STONE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT JAMES S. STONE'S BRIEF IN OPPOSITION

Maria T. Vullo
Counsel of Record
Evan Norris
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Hartley David Alley
LAW OFFICES OF HARTLEY
D. ALLEY
12499 W. Colfax Ave.
P.O. Box 280868
Lakewood, CO 80228-0868
(303) 431-8660

Attorneys for Respondent
James S. Stone

QUESTIONS PRESENTED

Whether the Court should review the Tenth Circuit's factbound determination, affirming the decisions of two district court judges in this 17 year-old case, that the *qui tam* plaintiff qualifies as an "original source" under the False Claims Act, 31 U.S.C. § 3730(e)(4), under the particular facts of this case.

Whether the Court should review petitioners' constitutional challenges, pursuant to the Appointments and Take Care Clauses of Article II, to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, in the absence of a conflict of authority or indeed any relevant case law support at all.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF THE CASE 2

A. Mr. Stone's Direct and Independent Knowledge Leads to a Criminal Investigation and This Lawsuit 2

B. Rockwell's Criminal Guilty Plea 5

C. Relevant Proceedings Below 6

1. Rockwell's Motion to Dismiss 6

2. The Government's Intervention 7

3. The Amended Complaint 8

4. The Trial and Jury Verdict 9

5. Post-Trial Motions 9

6. Appeals 10

7. Limited Remand and Affirmance 12

REASONS FOR DENYING THE PETITION 13

I. PETITIONERS' FACTBOUND ORIGINAL SOURCE ARGUMENT DOES NOT MERIT REVIEW 13

A. The Tenth Circuit Correctly Applied Settled Principles of Law to the Particular Facts of This Case 15

B. There Is No Circuit Conflict 17

C. Review By This Court Would Not Affect the Outcome of This Case 25

II. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE NOT SUPPORTED BY ANY COURT DECISION AND DO NOT MERIT REVIEW 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Buckley v. *Valeo*, 424 U.S. 1 (1976) 28

Comstock Resources, Inc. v. *Kennard*, 125 S. Ct. 2957 (2005) 14

Cooper v. *Blue Cross & Blue Shield of Florida Inc.*, 19 F.3d 562 (11th Cir. 1994) 19, 20

Edmond v. *United States*, 520 U.S. 651 (1997) 28

Kennard v. *Comstock Res., Inc.*, 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005) 14

Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U.S. 387 (1923) 18, 27

Minnesota Association of Nurse Anesthetists v. *Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2000), *cert. denied*, 537 U.S. 944 (2002) 17, 20

Morrison v. *Olson*, 487 U.S. 654 (1988) 28, 29

Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) 26

Riley v. *St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) 28

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 24

Seal 1 v. *Seal A*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) 23

United States ex rel. Aflatooni v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999)..... 18, 22

United States ex rel. Barth v. *Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995) 18

United States ex rel. Cosens v. *Yale-New Haven Hosp.*, 233 F. Supp. 2d 319 (D. Conn. 2002) 26

United States ex rel. Fine v. *Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996)..... 15

United States ex rel. Hafter v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999).....11, 15, 17

United States ex. rel. Kelly v. *Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) 28

United States ex rel. King v. *Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), *cert. denied*, 510 U.S. 1140 (1994) 11

United States ex rel. Laird v. *Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) 21

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 26

United States ex rel. Merena v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000)..... 26

United States ex rel. Mistick PBT v. *Housing Authority of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) 18, 23, 25

United States ex rel. Springfield Terminal Railway Co. v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) 17, 20, 26

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P. A. v. *Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) 18

United States ex rel. Taxpayers Against Fraud v. *General Electric Corp.*, 41 F.3d 1032 (6th Cir. 1994) 28

United States v. *MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996) 15

Vermont Agency of National Resources v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 27

Watson v. *Blankinship*, 20 F.3d 383, 387 (10th Cir. 1994) 16

Wisconsin Electric Co. v. *Dumore Co.*, 282 U.S. 813 (1931) 13

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Art. II, § 2 27

U.S. Constitution, Art. II, § 3 28

STATUTES

31 U.S.C. §§ 3729-33 1

31 U.S.C. § 3730 ..... *passim*

OTHER MATERIALS

S. Ct. R. 10 13

Brief for the United States as *Amicus Curiae*, *Comstock Resources, Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005) (No. 04-165), 2005 WL 1254202 ..... 14, 18

S. Rep. No. 99-345 (1986) (Conf. Rep.) 17, 26

RESPONDENT JAMES S. STONE'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Rockwell's petition boils down not to a circuit conflict, as Rockwell tries to create, but rather simply to a dispute about the particular facts of this 17-year-old case, which Rockwell lost before a jury in 1999. James S. Stone, an 81-year-old retired Rockwell engineer, has proven his status as a proper *qui tam* relator time and time again since filing this lawsuit in 1989, by presenting evidence that he had direct and independent knowledge of the facts underlying his claim that Rockwell violated the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"). The Government consistently has maintained that Mr. Stone is a proper FCA plaintiff, and the court of appeals and district court have so held based on the parties' evidentiary submissions and a full pretrial and trial record. Factbound determinations such as this do not merit the Court's review.

Nor are Rockwell's constitutional arguments based on a discernible conflict of authority. Indeed, Rockwell has not cited a single FCA case holding that the *qui tam* provisions violate the Appointments and Take Care Clauses. Not only is there no conflict of authority, but there is no authority to support Rockwell's constitutional claims at all.

Finally, review by this Court would not change the outcome of this case, as Rockwell is liable to the Government for the full amount of the $4.2 million judgment, regardless of Mr. Stone's relator status. Mr. Stone's share of the judgment is a matter between him and the Government, and does not affect Rockwell's interest. For this reason too, review should be denied.

COUNTERSTATEMENT OF THE CASE[1]

Mr. Stone, an 81-year old retired engineer, commenced this action in July 1989 under the *qui tam* provisions of the FCA, alleging that Rockwell had made false statements to the Government in connection with its environmental, safety and health ("ES&H") activities at the Rocky Flats nuclear weapons facility outside Denver, Colorado ("Rocky Flats" or "the Plant"). (Pet. App. 4-5a.)[2] Based in part on submissions by Mr. Stone, the United States intervened in the action in 1996. (*Id.* 8a; CA App. 905.) In 1999, Mr. Stone and the Government jointly tried the case to a twelve-member jury in a six-week trial. On April 1, 1999, the jury returned a verdict for plaintiffs under the FCA, and the district court (Matsch, C.J.) entered final judgment in favor of Mr. Stone and the Government in the amount of $4,172,327. (Pet. App. 9-10a, 68a.)

Rockwell's petition itself demonstrates the factbound nature of this case. And those facts establish – as the court of appeals and district court have held – Mr. Stone's proper status as a *qui tam* plaintiff in this fully-litigated case. Specifically:

A. Mr. Stone's Direct and Independent Knowledge Leads to a Criminal Investigation and This Lawsuit

Following 30 years of engineering experience and several patented inventions, Mr. Stone was employed by

---

[1] Mr. Stone disagrees with petitioners' statement of the facts.

[2] Citations to the petition and appendix are denoted as "Pet." and "Pet. App." Citations to Mr. Stone's appendix are denoted as "Resp. App." The Appellant's Appendix before the Tenth Circuit is denoted as "CA App." and references to the trial transcripts found therein in Volumes VII through IX are to the transcript pages and are denoted as "Tr." Appellee/Cross-Appellant James S. Stone's Supplemental Appendix before the Tenth Circuit is denoted as "SA."

Rockwell at Rocky Flats from November 1980 through March 1986 as Principal Engineer in Rockwell's Facilities, Engineering, and Construction Division and, later, as Lead Principal Engineer in the Utility Design Department. (Pet. App. 3a, 17a; Resp. App. 2a.) Given his broad and lengthy experience, Mr. Stone's job for Rockwell consisted of plant-wide "troubleshooting" to identify and devise solutions to engineering problems, including those arising in Rockwell's ES&H operations. (Pet. App. 17-18a; Resp. App. 2a.) Projects to which Mr. Stone was assigned at Rocky Flats included waste treatment through a cementation process used to remove and solidify pond sludge and salt wastes to produce "pondcrete" and "saltcrete," sewage treatment plant operations, the spray irrigation wastewater disposal system, and plutonium processing and beryllium machining operations. (Pet. App. 18a; Resp. App.3-11a.) While working on these projects, Mr. Stone observed serious ES&H problems associated with each of these areas. (Pet. App. 18a; Resp. App. 6-8a, 19a, 25a (pondcrete/saltcrete); *id.* 3-4a (sewage treatment plant); *id.* 4-6a, 17-18a (spray irrigation); *id.* 8-10a (plutonium); *id.* 11a, (beryllium); *id.* 14a (observations made firsthand).)

Mr. Stone also knew that Rockwell was being paid under its contract based on false claims. As the evidence below showed, Mr. Stone knew that Rockwell's profits for its operation of the Plant consisted principally of award fee bonuses, and during his employment Mr. Stone reviewed documents describing the manner by which those bonuses were determined. (Resp. App. 12a, 20-23a.) Mr. Stone specifically knew that Rockwell's award fee bonuses were based in part on its satisfactory performance in various ES&H areas, including "Environmental Protection" and "Waste Management," and that Rockwell was required to report ES&H problems to the Department of Energy ("DOE"). (*Id.* 12a.)

Although Mr. Stone reported ES&H problems he observed to Rockwell management, he and other Rockwell

employees were specifically instructed not to discuss those problems with DOE personnel. (Resp. App. 12-13a.) Nor did Rockwell's management take actions to address those problems. (*Id.* 6-11a.) At the same time, Mr. Stone observed that Rockwell continued to receive award fee evaluations and lucrative bonuses that did not reflect the existence of the ES&H problems he had reported to Rockwell management. (*Id.* 12a.)

In the three years following the termination of his employment by Rockwell, and before any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily met and spoke on multiple occasions with the Federal Bureau of Investigation ("FBI") and the Environmental Protection Agency ("EPA") (CA App. 457-71; Resp. App. 13-14a), a fact Rockwell conveniently ignores in its petition. In those meetings, Mr. Stone reported the ES&H problems he had observed at Rocky Flats, including problems with pondcrete and spray irrigation; turned over 2,300 pages of related documents from the Plant; identified other present and former Rockwell employees with knowledge of these problems; and advised the Government regarding sources of additional documents. (Resp. App. 13a.) Among the documents Mr. Stone provided to the Government was an October 13, 1982 Engineering Order in which he stated, with respect to the manufacturing process for pondcrete: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . ." (Pet. App. 51a; Resp. App. 19a.) As the court of appeals would later find, this Engineering Order "was explicit in articulating his belief that the proposed design for making pondcrete was flawed . . . . Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." (Pet. App. 18a.) It is undisputed that Rockwell produced pondcrete that was unstable and caused hazardous wastes to leach into the environment. (CA App. 1869-70.)

Following these meetings, in June 1989, the FBI and EPA executed a search warrant at the Plant.[3] (Pet. App. 4a.) The search warrant was based on an affidavit signed by the same FBI agent with whom Mr. Stone had met. (CA App. 778.) The Justice Department's Criminal Division convened a grand jury to proceed with the investigation. (*Id.* 909.)

Almost simultaneously, but after first providing his information to the Government, Mr. Stone commenced this action in July 1989 under the *qui tam* provisions of the FCA alleging that Rockwell had misrepresented the status of its ES&H performance to the Government in order to induce payments under its DOE contract. (CA App. 81, 89-93.) As required by the FCA, Mr. Stone's complaint was filed under seal and thus was not served on Rockwell at that time, and Mr. Stone provided his complaint and a lengthy disclosure statement to the Government outlining additional information underlying his allegations, including information specifically relating to pondcrete and spray irrigation. (*Id.* 491-561; Resp. App. 15a, 24-26a.)

B. Rockwell's Criminal Guilty Plea

On March 26, 1992, after several years of investigation, Rockwell entered into a plea agreement with the Justice Department's Criminal Division under which it pleaded guilty to ten environmental crimes arising from Rockwell's pondcrete, saltcrete and spray irrigation operations at Rocky Flats – matters already addressed by Mr. Stone and alleged in his FCA

---

[3] Petitioners, relying on inadmissible hearsay statements from alleged Justice Department sources made at the time of the criminal case against Rockwell, argue that the Government did not view Mr. Stone as a whistleblower. (Pet. 10-11.) These statements do not negate Mr. Stone's direct and independent knowledge. Furthermore, the Government has consistently stated in this case that it views Mr. Stone as an original source. (SA 26.)

complaint and disclosure statement – and agreed to pay $18.5 million in criminal fines. (CA App. 1861-92; Pet. App. 7a.) Significantly, the plea agreement specifically excluded Rockwell's liability in Mr. Stone's FCA action. (CA App. 1889.)

C. Relevant Proceedings Below

1. *Rockwell's Motion to Dismiss*

In late 1992, Rockwell moved to dismiss Mr. Stone's action under the direct and independent knowledge prong of the original source rule, arguing that Mr. Stone did not identify the specific documents containing the false claims or statements and the persons who submitted them. (CA App. 116-36.) Rockwell did not contest that Mr. Stone voluntarily provided his information to the Government prior to his filing suit. (*Id.*)

In response, Mr. Stone submitted a lengthy sworn affidavit with attachments explaining his role as a principal engineer for Rockwell and his knowledge gained in that role of ES&H problems at the Plant, including those relating to ponderete, spray irrigation, sewage treatment, plutonium and beryllium operations, which he reported to Rockwell management (Resp. App. 2-11a); and that Rockwell's compensation consisted primarily of award fee bonuses the amount of which was determined by its performance in various areas, including ES&H matters (*id.* 12a, 20-23a). Mr. Stone further explained that he provided this information, as well as documents from the Plant, to the FBI and EPA over a three-year period and continued to work with these investigative authorities through 1989 *before* he filed this FCA suit. (*Id.* 13-15a; CA App. 457-71.)

Significantly, in submissions to the district court, Rockwell acknowledged Mr. Stone's direct and independent knowledge in these areas:

> At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination; *that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment;* that plutonium "gloveboxes" were leaking and lacked necessary filters; and that the beryllium machine shop was contaminated with hazardous levels of beryllium.

(CA App. 578 (citations omitted, emphasis added); *id.* 567 ("Stone's assertion that he told the FBI/EPA about ES&H 'problems' at Rocky Flats is, on the other hand, accurate.").)

On February 2, 1994, the district court (Carrigan, J.) denied Rockwell's motion to dismiss. The court found, based on the factual record submitted, that Mr. Stone had firsthand knowledge of ES&H problems acquired through his role as plant troubleshooter, that Mr. Stone knew that Rockwell's compensation was based on its compliance with ES&H standards and that Rockwell's compensation would be adversely affected if it did not perform appropriately in these areas, and that Mr. Stone was instructed by Rockwell management not to divulge ES&H problems to DOE. (Pet. App. 61a.) Thus, the court concluded, "Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." (*Id.*)

2. *The Government's Intervention*

In 1995, the Government moved to intervene in Mr. Stone's action, explaining that it had obtained information

through "a separate proceeding[4] as well as material submitted to the Government by Mr. Stone" confirming Mr. Stone's FCA allegations and, in particular, those concerning Rockwell's misrepresentations as to the solidification of wastes through the pondcrete/saltcrete process and its improper spray irrigation practices. (CA App. 900, 905.) Finding good cause, the district court (Matsch, C.J.) granted the motion, and that ruling is not challenged here. (Pet. App. 8a; CA App. 964-71.)

3. The Amended Complaint

Mr. Stone and the Government jointly filed an Amended Complaint on December 20, 1996, alleging, in Count One, FCA violations in connection with Rockwell's pondcrete, saltcrete, and spray irrigation waste treatment operations. (CA App. 979-91.) The Government alleged additional common law claims, and Mr. Stone separately alleged an FCA claim relating to Rockwell's plutonium operations.[5] (*Id.* 996-1004.)

Specifically, plaintiffs alleged that, due to defective design and manufacturing, a substantial number of the pondcrete and saltcrete blocks Rockwell manufactured and stored outdoors were unstable and, as a result, hazardous materials leached onto the pads under the blocks and the surrounding area. (CA App. 982, 984.) With respect to spray irrigation, plaintiffs alleged that Rockwell improperly disposed of wastewater from plutonium operations and the sewage treatment plant by

---

[4] After Rockwell was dismissed as contractor at Rocky Flats, Rockwell sued the Government in the Court of Federal Claims for amounts allegedly due under its contract. The Government has defended the case on the ground, among others, that Rockwell committed fraud as contractor at the Plant. (CA App. 903-904.)

[5] Mr. Stone's plutonium claim, which the Government did not adopt, was severed by the district court and has never been tried. (Pet App. 8-9a.) Thus, following trial, the district court entered judgment pursuant to Fed. R. Civ. P. 54(b). (Pet. App. 68a)

spraying it on the fields surrounding Rocky Flats, which wastewater ran into and polluted Woman Creek and other nearby water supplies. (*Id.* 988-89.) Plaintiffs contended that Rockwell failed to report these environmental conditions to the Government, resulting in the fraudulent receipt of award fees under Rockwell's DOE contract. (CA App. 989-991.) These claims were further detailed in the extensive discovery proceedings, and summarized in the final pre-trial order. (CA App. 1076-95.)

4. The Trial and Jury Verdict

Plaintiffs' pondcrete, saltcrete and spray irrigation claims were presented jointly by Mr. Stone and the United States to a twelve-member jury during a six-week trial. On April 1, 1999, the jury returned a verdict finding that Rockwell made false statements in violation of the FCA for the three award fee periods from April 1, 1987 through September 30, 1988. (CA App. 1119-20.) The jury awarded damages in the amount of $1,390,775.80, which, under the treble damage provision of the FCA, resulted in a final judgment of $4,172,327.40. (Pet. App. 10a, 68a.)[6]

5. Post-Trial Motions

After the jury verdict, Rockwell argued that the district court should not enter judgment in favor of Mr. Stone because he was not an original source. (CA App. 1135-54.) On May 5, 1999, Rockwell also, for the first time, asked for a ruling on the constitutionality of the *qui tam* provisions. (*Id.* 1459.) In response, the Government agreed with Mr. Stone that the district court's 1994 original source ruling was correct and should not

---

[6] The jury did not find liability for other award fee periods, and found for Rockwell on the Government's common law claims. The district court, in accordance with the FCA, also assessed civil penalties in the amount of $15,000.00. (Pet. App. 10a, 68a.)

be revisited. (SA 23-26; CA App. 1408.) As the court of appeals later noted, "the United States did not contend in the district court that Mr. Stone had failed to make the necessary disclosures to the Government." (Pet. App. 51a, n.5.) To the contrary, the Government stated that "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests," and that the Government did not question Mr. Stone's proper status as a *qui tam* plaintiff in this case. (SA 26.)

The district court denied Rockwell's renewed motion to dismiss on original source grounds and also rejected Rockwell's constitutional arguments, and entered final judgment in favor of both plaintiffs on May 13, 1999. (Pet. App. 66-68a.) The court correctly noted that Rockwell had no stake in the amount of recovery to which Mr. Stone is entitled, because Rockwell must pay the full verdict to the Government in any event. (SA 124.) The district court also denied plaintiffs' motion for a new trial on damages (SA 75) and entered an amended final judgment in favor of both plaintiffs on June 10, 1999.[7]

6. Appeals

Rockwell appealed on various grounds, including the "original source" issue, and cross-appeals were filed by Mr. Stone and the Government on the damages issue. The Government also appealed from the dismissal of its common law claims. Significantly, with respect to the original source issue, Rockwell did not contest the facts in the record showing

---

[7] Respondents sought a new trial on damages based on the district court's admission of prejudicial testimony of Rockwell's "expert" regarding environmental damages at other DOE plants. (SA 29-45.) In addition to award fees, plaintiffs had sought as damages the millions of dollars in costs expended by the Government to clean up the environmental damage resulting from Rockwell-produced ponderete and salterete. (CA App. 1065.)

that Mr. Stone had provided documents and information to the Government regarding pondcrete and spray irrigation prior to filing this suit.

On September 24, 2001, in an opinion authored by Judge Holloway, a Tenth Circuit panel majority affirmed the district court's rulings in their entirety and dismissed all cross-appeals. The court of appeals held that the district court had correctly determined that Mr. Stone was an original source, because he had direct and independent knowledge of the facts underlying his claims. The court specifically held that Mr. Stone's prediction in his 1982 Engineering Order that the pondcrete process would not work, among other record evidence, constituted direct and independent knowledge of the pondcrete claim as to which Rockwell was found liable. (Pet App. 17-20a.)

Judge Briscoe dissented. The dissent did not take issue with the panel majority's articulation of the direct and independent knowledge requirement, but rather with the majority's application of the law to the facts of this case. (Pet. App. 44-48a.)

On November 2, 2001, Rockwell filed a petition for rehearing and rehearing *en banc* on the question whether Mr. Stone had satisfied the two prongs of the original source rule. Tellingly, Rockwell sought to justify rehearing and rehearing *en banc* by arguing that the decision of the court of appeals below created an *intra*-circuit split with two other Tenth Circuit decisions, *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), and *United States ex rel. King* v. *Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), *cert denied*, 535 U.S. 905 (2002), concerning the direct and independent knowledge and pre-filing disclosure prongs, respectively.

On March 4, 2002, the Tenth Circuit rejected Rockwell's intra-circuit split argument and reaffirmed its ruling that, in line

with *Hafter*, Mr. Stone had direct and independent knowledge of the information on which his allegations were based. (Pet. App. 15-22a.) The panel, however, issued an amended opinion and directed a limited remand on the factual issue of whether Mr. Stone had satisfied the second prong, *i.e.*, whether he voluntarily provided his information to the Government before filing this FCA action. (*Id.* 22-23a, 43-44a.) The court of appeals affirmed all of the remaining rulings in their entirety, including the ruling that the FCA does not violate Article II of the Constitution. (*Id.* 43-44a.) The suggestion for rehearing *en banc* was denied. (*Id.* 1a.)

7. Limited Remand and Affirmance

On limited remand, the district court received submissions from the parties concerning the information Mr. Stone provided to the Government prior to the filing of this action. (Pet. App. 50a.) On December 17, 2002, the district court issued an order making certain findings of fact, but no conclusions of law. (*Id.* 50a, 75a.) In its order, the district court specifically found that Mr. Stone provided to the Government documents relevant to the ES&H matters at issue, including his Engineering Order related to pondcrete, prior to bringing this suit. (Pet. App. 73a.)[8]

Following the remand proceedings and after further briefing, on March 5, 2004, the Tenth Circuit reaffirmed the judgment of the district court in all respects as set forth in its

---

[8] The district court declined to consider additional affidavits submitted by Mr. Stone and his counsel regarding Mr. Stone's meetings with the FBI. Mr. Stone appealed from that order. Following the Tenth Circuit's decision on the main appeal, the Tenth Circuit denied as moot Mr. Stone's motion to supplement the record to include the affidavits and the second appeal was held in abeyance. (Pet. App. 53a.) Were this case to be reviewed by the Court, the matter of these additional affidavits may need to be addressed by the courts below.

previous opinion. (Pet. App. 52-53a.) Judge Briscoe again dissented, for the same reasons as in her prior dissent.[9]

On April 16, 2004, Rockwell filed another petition for rehearing and rehearing *en banc*, contending, once again, that the Tenth Circuit's decision presented an *intra*-circuit conflict with *King* as to the pre-filing disclosure issue. On January 4, 2006, the Tenth Circuit denied Rockwell's second petition. (Pet. App. 57a.) On April 4, 2006, Rockwell filed its petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' FACTBOUND ORIGINAL SOURCE ARGUMENT DOES NOT MERIT REVIEW

At bottom, Rockwell's petition challenging Mr. Stone's original source status takes issue only with the application of a properly stated rule of law to the particular facts of this case, which is not a basis for this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). In an attempt to overcome this obvious shortcoming, Rockwell tries to conjure a conflict of authority about what amount of "direct" knowledge a *qui tam* relator must have under 31 U.S.C. 3730(e)(4)(B), but, significantly, no court of appeals has recognized such a conflict, and there is none. *See Wisconsin Elec. Co.* v. *Dumore Co.*, 282 U.S. 813, 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.") (citation omitted).

---

[9] Judge Politz, sitting by designation from the Fifth Circuit, passed away before the Tenth Circuit's second decision following remand, and was replaced by Judge Hartz.

The FCA statute clearly defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit did in this case, all circuits apply a fact-intensive analysis to determine whether a particular *qui tam* plaintiff is an original source under the plain language of the statute. *See* Brief for the United States as *Amicus Curiae*, *Comstock Res., Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005) (No. 04-165), 2005 WL 1254202, at *13, ("A sensible application of the 'original source' requirement in Section 3730(e)(4)(B) must take into account [many] considerations. No single brightline test will be adequate to resolve all cases in light of the widely varying fraudulent schemes that may give rise to *qui tam* actions.").[10]

Below, both the district court and the court of appeals performed the analysis required by the FCA and concluded that Mr. Stone was an original source based on the facts of this case. Rockwell's petition is simply a disagreement with the result of that factbound analysis, which is not a basis for this Court's review.

---

[10] Rockwell argues that the Court's denial of certiorari last year in *Comstock Resources, Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005), another FCA case from the Tenth Circuit, does not indicate that the Court should deny its petition because "[t]his case goes further." (Pet. 23.) In fact, however, this case is less certworthy than *Comstock*. First, the relators in *Comstock* were not employees, like Mr. Stone, involved in the very issues that formed the basis for the action. *See Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1040-41 (10th Cir. 2004). Second, the Government did not intervene in *Comstock* and thus was unable to protect its interests in the way it has been able to do here. And third, review of this case would not affect Rockwell's liability, as it is liable to the Government in any event for the full amount of the judgment. In short, nothing about Rockwell's petition presents a more persuasive case for review than *Comstock* did.

A. The Tenth Circuit Correctly Applied Settled Principles of Law to the Particular Facts of This Case

After considering Rockwell's arguments on appeal – and again in Rockwell's petitions for rehearing – the Tenth Circuit twice has affirmed the district court's ruling that Mr. Stone's knowledge of Rockwell's environmental frauds was direct and independent, as required by the FCA. (Pet. App. 1a, 17a.) Significantly, in none of its decisions did the court of appeals acknowledge any conflict of authority. Because there is none.

In the decision below, the court of appeals began by setting forth the relevant legal standard, which Rockwell does not (and cannot) contest.

> We have explained that for purposes of determining whether a relator qualifies as an original source, the FCA's direct and independent knowledge requirement is properly construed to mean that the knowledge possessed by the relator must be "marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor." *United States ex rel. Hafter* v. *Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999) (quoting *United States* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996)) (alterations in original). In other words, "direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others," while independent knowledge means that "the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources." *United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) (citation omitted).

(Pet. App. 15a.)[11]

The court of appeals then reviewed the evidence, including Mr. Stone's affidavit describing his trouble-shooting duties at Rocky Flats, his concerns about the manufacturing of pondcrete, and the documents Mr. Stone provided to the Government before he filed this suit. (Pet. App. 17-19a.) The court also reviewed Mr. Stone's confidential disclosure statement to the Government and, specifically, the information concerning pondcrete and Rockwell's concealment of environmental problems at Rocky Flats. (*Id.* 18-20a.) The court held that this factual evidence of direct and independent knowledge was sufficiently specific to satisfy the FCA's requirements under settled case law. (*Id.* 20a.)[12]

The court of appeals was "not persuaded by Rockwell's arguments to the contrary, which are permeated by a flawed understanding of the FCA's definition of direct and independent knowledge." (Pet. App. 20a.) Specifically, the court of appeals rejected Rockwell's contention that a *qui tam* relator "must have direct and independent knowledge of the *actual* fraudulent submission to the government." (*Id.* (emphasis in original).) The court correctly held that the "plain text of the FCA . . .

---

[11] The court of appeals properly rejected Rockwell's after-the-fact argument that Mr. Stone was not a proper *qui tam* relator because he was no longer employed by Rockwell during the award fee periods for which Rockwell was found liable. (Pet. App. 21-22a.) Indeed, it would be inappropriate for the jury's verdict in an FCA case retroactively to impact an issue of subject matter jurisdiction. For example, a jury's small monetary verdict cannot retroactively divest a federal court of diversity jurisdiction. *See Watson* v. *Blankinship*, 20 F.3d 383, 387 (10th Cir. 1994). So, too, here with respect to the original source rule.

[12] Contrary to petitioners' contention, the court of appeals did not hold that mere "background information 'underlying or supporting' [the relator's] supposition that a defendant might have engaged in fraud" is sufficient to qualify as a proper *qui tam* relator. (Pet. 15.)

belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess 'direct and independent knowledge of the *information on which the allegations are based*.'" (*Id.* (emphasis in original).)[13] In doing so, the court of appeals followed both the plain language of the statute and the court's prior decision, *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), on which Rockwell itself had relied. (Pet. App. 20-21a (citations omitted).). A review of the record "convinc[ed] [the court of appeals] that Stone ha[d] been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste." (*Id.* 17a.) Rockwell's disagreement with the result of the court of appeals' straightforward application of law to facts is not a basis for review.

B. There Is No Circuit Conflict

Rockwell's claim that the Tenth Circuit's original source ruling merits the Court's review because it "deepens an existing circuit split" (Pet. 13) is unfounded.

Indeed, *none* of the cases on which Rockwell relies, from the Third, Eighth, Ninth, Eleventh, and D.C. Circuits, even

---

[13] Consistently with the decisions of other courts of appeals, the courts below recognized that a relator need not have knowledge of every detail of every element of an FCA claim (Pet. App. 20-21a); *see Minn. Assoc. of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2000), and, indeed, such a requirement would eviscerate the goal of the FCA to encourage shop floor employees to bring fraud to the attention of the Government. *See United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 650-51 (D.C. Cir. 1994). (stating that the "expressed intention" of the 1986 amendments to the FCA was to "encourage more private enforcement suits") (quoting, S. Rep. No. 99-345, at 23-24 (1986) (Conf. Rep.)).

acknowledges a split (much less a "deepen[ing]" one) as to what constitutes direct and independent knowledge under § 3730(e)(4)(B) of the FCA. The Tenth Circuit does not acknowledge such a split. And neither does the United States. *See* Brief for the United States as *Amicus Curiae*, *Comstock Res., Inc.* v. *Kennard*, *supra*, 2005 WL 1254202 at *9 ("The Tenth Circuit's construction of the term 'original source' is substantially similar to the approaches taken by other courts of appeals.").

As the Court has stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ as improvidently granted). This hardly is such a case.

Tellingly, Rockwell itself did not assert any circuit conflict in the courts below. Indeed, in its first petition for rehearing in the Tenth Circuit, Rockwell cited some of the very cases it now says demonstrate a split, and argued that those very cases were *in line with* the Tenth Circuit's 1999 decision in *Hafter* – and that the court of appeals in this case had erred in deviating from the law in the Tenth Circuit as enunciated in *Hafter*.[14] As Rockwell must concede, this Court should not review any contention as to an intra-circuit split.

---

[14] Rockwell cited the following cases: *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P. A.* v. *Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999); *United States ex rel. Barth* v. *Ridgedale Elec., Inc.*, 44 F.3d 699 (8th Cir. 1995); *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999).

In response to Rockwell's then intra-circuit split argument, the court of appeals emphasized that its decision involved an application of law to facts that was in line with the approach taken by the same court of appeals in *Hafter*. (Pet. App. 15-22a; *see also id.* 17a ("Notwithstanding Rockwell's claim that Stone's evidence of his direct and independent knowledge is inadequate to satisfy the specificity we required in *Hafter*, we believe that Stone has adduced sufficient competent proof to establish that he had direct and independent knowledge of the information on which his FCA claim was based.").)

Now, however, Rockwell contends that six decisions, reflecting six applications of the same law to six different sets of facts, make a circuit split. Not so. Although courts have reached different outcomes in cases presenting different sets of facts, that does not represent any conflict of authority on the legal standard. Tellingly, no court of appeals has recognized any such conflict. Rockwell's argument is simply a selective reading of applications of the same law to different sets of facts. It does not merit review.

Indeed, a review of the Eighth, Eleventh, and D.C. Circuit decisions Rockwell cites, which all find the relator to be an original source, demonstrates how alone Rockwell is in its view of a circuit split, and that Mr. Stone meets even Rockwell's articulation of the supposedly different standards.

In *Cooper* v. *Blue Cross & Blue Shield of Florida, Inc.* (Pet. 16-18), the Eleventh Circuit found that the relator's knowledge of alleged fraud by a Medicare secondary payor was "direct" because he had developed his knowledge through "three years of his own claims processing, research and correspondence with members of Congress and [the Health Care Financing Administration]." 19 F.3d 562, 568 (11th Cir. 1994). In a footnote, the court rejected the defendants' contention that Cooper, who, unlike Mr. Stone, was not an employee of the defendant, did not provide substantive information that

"seriously contribute[d] to the disclosure of fraud," explaining that as the "purpose of the FCA was to enlist the public's help in uncovering specifically each and every perpetrator of fraud[,] Cooper's information is potentially specific, direct evidence of fraudulent activity by [Blue Cross]." *Id.* at 568 n.12 (citations omitted). Mr. Stone's detailed, firsthand knowledge of ES&H violations at Rockwell, gained in his role as a Rockwell engineer working on these very matters, is even stronger than the relator's was in *Cooper* and, thus, easily meets *Cooper's* articulation of the requirements of § 3730(e)(4)(B).

The Eighth Circuit's decision in *Minnesota Association of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2000), *cert. denied*, 537 U.S. 944 (2002), also is fully consistent with the Tenth Circuit's decision below. There, after reviewing the factual record, the court concluded that the relators, nurse anesthetists, were proper plaintiffs, where they had personal knowledge that anesthesiologists regularly submitted fraudulent bills to Medicare for anesthesia procedures by virtue of their participation in the procedures and observation of the anesthesiologists' billing practices. *Id.* Like Mr. Stone's knowledge, the nurse anesthetists' knowledge was gained from their own efforts. Even more so than the relators in *Nurse Anesthetists*, Mr. Stone's activities as Plant trouble-shooter and his observation of serious ES&H problems with Rockwell's pondcrete manufacturing process gave him direct and independent knowledge of the true state of facts. Thus, *Nurse Anesthetists* does not help Rockwell either.

Nurse Anesthetists cites one case in its discussion, *Springfield*, the D.C. Circuit case Rockwell cites as evidencing a supposed split. (Pet. 19-22.) *Springfield*, too, supports Mr. Stone's position, not Rockwell's. The relator, Springfield Terminal Railway, alleged that Quinn, an arbitrator appointed to arbitrate a dispute between the railroad company and its union, falsified his payment records to the Government by charging for days on which he was not working. *United States ex rel.*

Springfield Terminal Ry. Co. v. *Quinn*, 14 F.3d 645, 647-648 (D.C. Cir. 1994). The court observed that "'direct and independent knowledge of information on which the allegations are based' refers to direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at 657. The court held that because

> the pay vouchers and phone records did not themselves suffice to indicate fraud, Springfield had to have bridged the gap by its own efforts and experience. . . . Springfield started with innocuous public information; it completed the equation with information independent of any preexisting public disclosure. As such, Springfield is an original source.

Id. Again, Mr. Stone's direct and independent knowledge of ES&H violations and Rockwell's award fee bonuses easily meets this standard.

Rockwell's contention that these cases represent different legal standards is unfounded. Indeed, the Fifth Circuit, in surveying decisions of its sister circuits on what constitutes "direct" knowledge under § 3730(e)(4)(B), cited the decisions in *Stone*, *Nurse Anesthetists* and *Cooper* as examples of three cases in which courts

> look to the factual subtleties of the case before it and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those actually involved in the process of unearthing important information about a false or fraudulent claim.

United States ex rel. Laird v. *Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355-56 (5th Cir. 2003). Thus, Rockwell's claim that the Tenth Circuit's decision in the instant

case "irreconcilably conflicts with" *Springfield*, *Nurse Anesthetists*, and *Cooper* (Pet. 16, 20) rings utterly hollow.

The two other decisions on which Rockwell relies, in which the relator was held not to be an original source, likewise do not demonstrate any conflict of authority nor any different standard that would result in a different outcome in this case.

In *United States ex rel. Aflatooni* v. *Kitsap Physicians Services* (Pet. 18-19), the relator, a physician, accused his employers of submitting false Medicare bills to the Government. 163 F.3d 516, 519-520 (9th Cir. 1999). The relator, however, "could not recall the name of any [M]edicare patient who was allegedly charged for unnecessary medical services." *Id.* at 526. Moreover, the relator's knowledge about his employers' billing practices was "specul[ative]." *Id.*[15] Accordingly, the court held that the relator did not have "firsthand knowledge . . . obtained . . . through his 'own labor unmediated by anything else.'" *Id.* at 525. By stark contrast here, Mr. Stone, as a principal engineer for Rockwell at the Plant, was required to – and did – identify problems in the Plant's ES&H operations, and also reviewed documents describing Rockwell's compensation. (Resp. App. 2-3a, 12a.) Mr. Stone's disclosures led to a criminal investigation resulting in a guilty plea, and a jury verdict under the FCA as to the same fraudulent environmental practices. Mr.

---

[15] The Tenth Circuit properly rejected Rockwell's argument that Mr. Stone's knowledge of ponderete manufacturing was speculative because he had already left Rocky Flats when production of ponderete began. As the court held, the fact that Mr. Stone did not personally witness the May 1988 spill was "immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing ponderete." (Pet. App. 21a.) Mr. Stone predicted this very problem and knew Rockwell withheld that fact from DOE while it received lucrative bonuses. That clearly qualifies him as an original source and not a "parasitic" relator seeking to benefit from the labors of others.

Stone's first-hand knowledge is simply not comparable to the speculative observations offered by the relator in *Aflatooni*.[16]

Finally, *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.), *cert. denied*, 529 U.S. 1018 (2000), likewise does not represent any conflict of authority but rather a different factual situation where the relator, unlike Mr. Stone, lacked direct and independent knowledge. Mistick, a construction contractor, alleged that defendants, an architectural firm and the Pittsburgh Housing Authority, defrauded the U.S. Department of Housing and Urban Development by making false claims for the cost of lead based paint abatement work in Pittsburgh public housing. *Id.* at 379. Unlike here, the relator in *Mistick* learned of the alleged misrepresentations from a FOIA request, and from civil discovery in a state court action. *Id.* at 381, 383.[17] The

---

[16] Rockwell also argues that there is a Ninth Circuit "exception" in which a "relator's status as an original source . . . is governed by proximate cause concepts." (Pet. 18-19.) In *Seal 1* v. *Seal A*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002), the court held that a *qui tam* relator could qualify as an original source if his disclosures to the Government "triggered' the investigation that led to the publicly disclosed information," even if the relator did not have prior knowledge of that information. *Id.* at 1162 (citation omitted). Mr. Stone's three years of meetings with the FBI and EPA, in which he reported the ES&H problems he had observed, turned over 2,300 pages of related documents from the Plant, identified other present and former Rockwell employees with knowledge of these problems, and advised the agents regarding sources of additional documents (Resp. App. 13-15a), following which a criminal investigation was launched, among other things, plainly would satisfy *Seal 1*.

[17] Though, as Rockwell notes (Pet. 15), the relator in *Mistick* was present for meetings with the defendants, those meetings occurred long after the defendants had agreed upon the original specifications for the lead paint abatement work and several months after Mistick had begun encapsulating the lead paint. *Mistick*, 186 F.3d at 379. Here, Mr. Stone's knowledge existed *before* the ponderete blocks leached *as he had predicted* and before the facts became public.

relator's knowledge in *Mistick* contrasts starkly with Mr. Stone's direct, firsthand knowledge of Rockwell's ES&H violations and the award fee process, gained from Mr. Stone's employment with Rockwell and his independent efforts. Also unlike the relator in *Mistick*, Mr. Stone had several meetings with the FBI and EPA about these matters before there was any public disclosure. The cases simply are not comparable on their facts.

The foregoing demonstrates that the Tenth Circuit requires a *qui tam* relator to have as much knowledge of the facts on which his or her allegations are based as other courts of appeal. Rockwell's contrary argument is based on selective quotation from differing articulations of the same standard; a misleading presentation of Mr. Stone's extensive knowledge of Rockwell's fraud, including his knowledge that there were environmental problems at Rocky Flats, that those problems were not disclosed to the Government and that Rockwell nonetheless continued to receive award bonuses; and on ignoring the fact that neither the FCA nor the case law requires that all the evidence presented at trial be part of the relator's knowledge.

In sum, each of the decisions cited by Rockwell presents nothing other than the application of a clear statutory standard to a particular set of facts. None presents a conflict of authority concerning the legal meaning of the direct and independent knowledge requirement. Although the facts and outcomes of cases may differ, that is not a basis for the Court's review.[18]

---

[18] Rockwell's argument – made for the first time in its Petition – that the Tenth Circuit's decision below somehow "conflicts with this Court's reading of similar statutory language" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351 (1993) (Pet. 13), a decision construing the Federal Sovereign Immunities Act, is untenable. Rockwell provides no support for the proposition that an interpretation of a provision in one statute can constitute a decision of "an important federal question in a way that

C. Review By This Court Would Not Affect the Outcome of This Case

Rockwell's petition should be denied for the additional reason that it raises no issue that would impact the outcome of this case. As shown above, Mr. Stone would meet even Rockwell's articulation of the standard in other circuits. But even putting this aside, review of Mr. Stone's relator status would not affect the outcome of this case because Rockwell is liable for the full amount of the judgment in any event.

The FCA statute makes clear that, where, as here, the Government has intervened in an action, the district court's jurisdiction is established. 31 U.S.C. § 3730 (e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . *unless the action is brought by the Attorney General or* the person bringing the action is an original source of the information.") (emphasis added). Rockwell ignores that the relator's right to share in any recovery obtained by the Government subsequent to intervention is controlled by a separate subsection of the Act, which focuses on the "extent to which the [relator] substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d). Rockwell has no stake in the decision as to what portion of the judgment will constitute Mr. Stone's share. In short, any decision concerning

---

conflicts with relevant decisions of this Court" as to another provision in a *different* statute. Certainly *Nelson* has never been relied on in any FCA case – though the dissent in one of the cases Rockwell cites discussed *Nelson* in the context of a provision in § 3730(e)(4) not at issue here. *See Mistick*, 186 F.3d at 395-96 (Becker, C.J., dissenting). Regardless, even if it *were* ever appropriate to consider conflicts between different statutes, this case would not be a suitable vehicle for the Court to consider the issue Rockwell presents. This is the first time Rockwell has ever raised *Nelson* or the Foreign Sovereign Immunities Act, and thus the Court does not have the benefit of lower court review of Rockwell's new argument.

Mr. Stone's status as a relator – which is the crux of Rockwell's petition – will have no impact on Rockwell's liability for the full amount of the judgment in this case. *See United States ex rel. Cosens* v. *Yale-New Haven Hosp.*, 233 F. Supp. 2d 319, 326 (D. Conn. 2002).[19]

The Court should not review a case where the outcome could not be affected and where only the litigants' private concerns are implicated. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit

---

[19] Rockwell argues that the outcome here could "foreclose" Mr. Stone's claim for statutory attorney's fees under 31 U.S.C. § 3730(d). (Pet 4, n.5.) The matter of attorney's fees is not before this Court. In any event, Rockwell has no proper interest in invoking the original source provision to prevent a recovery designed to compensate relators and their counsel who provide a public service by aiding the Government in its enforcement of the FCA. *See, e.g., United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (resolving dispute between *qui tam* relators and Government concerning relator's percentage share of the Government's recovery in case in which relator's claims were dismissed prior to settlement). Any contrary view is flatly contradicted by the goal of the FCA, which has always been to harness the energy of the citizenry in the service of the Government. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541-2 n.5 (1943), ("[The FCA] was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons. . . ."), *superseded by statute as recognized in Springfield*, 14 F.3d at 650. The legislative history of the 1986 amendments to the FCA makes it even more apparent that monetary incentives are specifically intended to encourage "any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2 (1986) (Conf. Rep.) *See Springfield*, 14 F.3d at 650 ("'[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. [Accordingly, the Senate bill] increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.'") (quoting S. Rep. No. 99-345, at 1-2 (1986) (Conf. Rep.)).

for the benefit of the particular litigants."); *Layne & Bowler Corp.*, 261 U.S. at 393. For this additional reason, review is wholly unwarranted here.

II. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE NOT SUPPORTED BY ANY COURT DECISION AND DO NOT MERIT REVIEW

Rockwell's contention that the FCA's *qui tam* provisions violate the Appointments Clause and the Take Care Clause of Article II of the U.S. Constitution was easily rejected by the court of appeals and plainly does not merit review. Not only is there no conflict of authority, but Rockwell does not (and cannot) cite a single FCA holding in support of its argument.[20] Nor would this case be a suitable vehicle for review of this issue, as the Government has prosecuted this case along with Mr. Stone to verdict.

Nevertheless, Rockwell contends that the FCA's *qui tam* provisions violate the Appointments Clause (Art. II, § 2, Cl. 2), which provides the mechanism for appointment of "Officers of the United States." (Pet. 24-27.) Rockwell's argument – made for the first time after trial – is that because *qui tam* relators

---

[20] Rockwell's contention that the Court in *Vermont Agency of National Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), "reserved" the issue of the constitutionality of the FCA's *qui tam* provisions under Article II (Pet. 24) is incorrect. The issue was not even raised in that case. In a footnote explaining its holding that "a *qui tam* relator under the FCA has Article III standing," the Court stated that, "[i]n so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3. Petitioner does not challenge the *qui tam* mechanism under either of those two provisions." 529 U.S. at 778 & n.8 (emphasis added). This footnote cannot possibly form the basis for review of this case, where no court of appeals has ever adopted Rockwell's argument.

operate as Government officers, Mr. Stone's conduct of this litigation somehow violates Article II. As the court of appeals held, Rockwell's argument is fundamentally flawed because "*qui tam* relators do not serve in any office of the United States." (Pet. App. 25a.) The court of appeals thus easily dismissed this argument as lacking any support. (Pet. App. 26a ("[W]e, like the other circuits that have considered the question, hold that the FCA's *qui tam* provisions do not contravene the Appointments Clause.") (citing *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) (*en banc*); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Corp.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex. rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994)).)[21]

Finally, Rockwell contends that the *qui tam* mechanism impermissibly undermines the President's exercise of his constitutional responsibility to "take Care that the Laws be faithfully executed" (Art. II, § 3), thereby violating separation of powers principles. (Pet. 27-30.) Significantly, Rockwell cites no FCA case in support of its novel argument – only dissents from the decisions of courts of appeals rejecting it.[22] (*Id.* 27-

---

[21] Rockwell's suggestion that the Court should grant review to "resolve the conflict with" *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *Edmond* v. *United States* 520 U.S. 651 (1997) (Pet. 27), also has no basis. *Buckley* held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed in § 2, cl.2 of that Article." 424 U.S. at 126. As the court of appeals held, *qui tam* relators "do not meet the[] requirements" of an Officer enunciated in *Buckley* and prior Court precedents. (Pet. App. 25-26a.) *Edmond* simply elaborated the bifurcated system of appointments established by Article II, which has nothing to do with this case. (*Id.* 24a.)

[22] Rockwell's suggestion that *Morrison* v. *Olson*, 487 U.S. 654 (1988), conflicts with the decision below (Pet. 30) has no merit either. *Morrison* held that congressional enactments must leave the Executive with enough control over litigation such that "the President is able to perform

28.) Indeed, Rockwell's argument wholly misconstrues the nature of the Executive's constitutional power and of the *qui tam* mechanism, as well as the facts of this case. Here, the Government intervened in the case and has fully protected its interests. All the FCA claims tried to the jury were jointly asserted by the Government and Mr. Stone, and at no time did the Government seek dismissal of any of Mr. Stone's claims, his removal from the case, or any limitation of his participation. The Tenth Circuit, again in harmony with the Fifth, Sixth and Ninth Circuits, correctly rejected Rockwell's argument below. (Pet. App. 28-29a (collecting cases).)[23]

Like its original source argument, Rockwell's constitutional arguments present no basis for review.

---

his constitutionally assigned duties." 487 U.S. at 696. Here, as the court of appeals held,

> the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. . . . [W]e remain unconvinced by Rockwell's contention that the presence of a qui tam relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities.

(Pet. App. 27a (citing *Morrison*, 487 U.S. at 695-96).)

[23] In the face of the unanimous view of the courts of appeals against Rockwell's position and the absence of any controlling Supreme Court decision, Rockwell offers only a 1989 opinion from an assistant attorney general in the Office of Legal Counsel that was never adopted by the Attorney General or Solicitor General. (Pet. 25-30.) Moreover, the opinion was superseded by the Office of Legal Counsel in 1996. (*Id.* 25) No court has ever adopted this position. It cannot possibly create a conflict of authority which does not exist in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Maria T. Vullo
Counsel of Record
Evan Norris
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Hartley David Alley
LAW OFFICES OF HARTLEY
D. ALLEY
12499 W. Colfax Ave.
P.O. Box 280868
Lakewood, CO 80228-0868
(303) 431-8660

Attorneys for Respondent
James S. Stone

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 89-C-1154-

UNITED STATES OF AMERICA *ex rel.*,
JAMES S. STONE,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.
[ENTERED]
[U.S. DISTRICT COURT]
[March 8, 1993]

AFFIDAVIT OF JAMES S. STONE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

STATE OF COLORADO)
: ss.:
COUNTY OF JEFFERSON)

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I am informed that defendant, Rockwell International Corporation ("Rockwell"), has filed a motion with the Court to dismiss my complaint on the ground that I allegedly am not an "original source" of the information on which my action is based. I further understand that, to be an "original source" under the False Claims Act, I must have direct and independent knowledge of information on which the allegations in this

lawsuit are based. Because I have such knowledge and am an original source of the claims here, I submit this affidavit in opposition to Rockwell's motion.

Background

2. I am a registered professional engineer in several states including Colorado and had over 30 years engineering experience when I commenced my employment with Rockwell on November 10, 1980, as a Principal Engineer in Rockwell's Facilities, Engineering and Construction Division at the Rocky Flats Plant located in Golden, Colorado ("Rocky Flats"). In January of 1982, I was promoted to Lead Principal Engineer at Rocky Flats in the Utility Design Department, Facilities Engineering Division. I continued in that position until March 17, 1986, when my employment with Rockwell was terminated.

3. My duties during my six years at Rocky Flats included plant-wide "troubleshooting" and the review of designs and existing operations for safety and cost effectiveness. One of my main responsibilities was to identify plant engineering problems and recommend solutions to management. As a result, during my six-year tenure at Rocky Flats, I was assigned to numerous projects that required me to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. Each project that I worked on was identified by a project number and involved a variety of tasks. I attach as Exhibit A a copy of the daily records that I personally kept during my employment at Rocky Flats. These records show the variety of tasks I performed at Rocky Flats. Each task is identified by the overall project number, and a short description of the specific task. As my daily time records show, and as I explain in greater detail below, many of my assigned tasks related to the claims at issue in this case, as organized and set forth in my Consolidated Answers to Discovery, dated October 27, 1992, and attached as Exhibit B, *i.e.*, claims involving surface and ground water contamination and waste

treatment, storage and disposal; plutonium contamination; and beryllium health and safety issues.[1] In the discussion that follows, I have cross-referenced, where appropriate, the pertinent responses set forth in my Consolidated Answers.

Ground and Surface Water Contamination and Waste Treatment, Storage and Disposal

4. During my employment at Rocky Flats, I obtained direct and independent knowledge of a number of different ground and surface water pollution problems and problems related to waste treatment, storage and disposal. The problems I discuss below in this general area can be divided into the following three general categories: (1) sewage treatment system problems related to toxic waste disposal; (2) spray irrigation; and (3) pondcrete/saltcrete.

5. One of my first projects at Rocky Flats was to review the design of the sewage treatment plant. The sewage treatment plant at Rocky Flats was intended to process only routine biological wastes. Nevertheless, as part of this assignment, I learned that the flows to the sewage treatment plant contained materials which indicated the presence of

---

[1] For example, among others, project numbers 308201, 315300, 315332, 325040, 325041, 329670, 338616, 345242, 345244, 365550, 379200, 420129, 420906, 430139, 430211, 430555, 430576, 430707, 440227, 440414, 460014, 460912, 460913 and 470247 include tasks involving ground water contamination, sewage treatment, solar ponds and related waste treatment, storage and disposal issues; project numbers 325063, 328957, 335614, 338601, 338611, 345252, 348342, 360456, 370373, 378029, 388611, 398017, 398138, 400204, 410109, 410300, 410301, 420205, 420219, 420305, 430527, 430601, 430642, 430900, 438139, 440219, 470214, 470304, 490006 and 550499 include tasks relating to gloveboxes, dump valves and plutonium in the air duct exhaust system; and project numbers 310072, 318109, 325056, 328955, 365634, 450003, 450010, 450125, 450917, 450918 and 460552 include tasks involving health and safety issues affecting workers at the beryllium shop.

industrial wastes as well as biological wastes. The industrial wastes at Rocky Flats are very toxic. They are hazardous or radioactive, or a mixture of both, and may be in liquid or solid form. These wastes are generated as part of the Rocky Flats production of nuclear bomb triggers and processing of nuclear materials. I learned of the presence of toxic wastes in the sewage treatment system when I reviewed certain records which reflected a low rate of biological process at the treatment plant and the presence of certain chemicals and metals, both of which indicated the presence of toxic waste. (*See* Exhibit B, Attachment 1, Items 7 & 17)

6. I concluded from this that the toxic wastes that should not have been present in the flows to the sewage treatment plant were killing the bacteria needed to process the biological waste at the sewage treatment plant. I also learned that many of the process buildings at Rocky Flats had laboratory sinks and floor drains that were connected to the drainage system to the sewage treatment plant. In my view, there also may have been broken lines and cross-connections between the toxic and biological waste disposal systems, and infiltration of contaminated ground water. Based on this, I concluded that the flows to the sewage treatment plant included toxic wastes from throughout the plant. (*See* Exhibit B, Attachment 1, Items 7 & 17; *see also id.*, Items 8, 9, 10 & 16)

7. The second general area of ground and surface water problems that I worked on at Rocky Flats had to do with the storage, treatment and disposal of both liquid industrial wastes from Rockwell's plutonium operations and the liquid wastes from the sewage treatment plant. At Rocky Flats, these wastes were sent to "holding" and/or "evaporation" ponds for storage, treatment, and disposal. The holding ponds primarily received the outflow from the sewage treatment plant; the evaporation ponds directly received the toxic industrial wastes from plutonium operations. When the ponds could no longer hold the full amount of these liquid wastes, Rockwell disposed of the wastes by a method called "spray irrigation."

Spray irrigation involves the transfer of wastes from the ponds to the grounds of Rocky Flats.

8. The use of spray irrigation to dispose of wastes from the evaporation ponds resulted in the disposal of highly toxic wastes directly on the ground. The use of spray irrigation to dispose of treated biological wastes, by contrast, would not ordinarily be a problem. At Rocky Flats, however, the use of spray irrigation from the holding ponds also was problematic because the wastes being spray irrigated were not solely biological wastes, but contained toxic materials. As stated earlier, the outflows from the sewage treatment plant contained toxic as well as biological wastes. Thus, Rockwell used spray irrigation to dispose of toxic wastes as well as biological wastes. (*See* Exhibit B, Attachment 1, Items 15 & 16)

9. Rockwell's improper use of spray irrigation also likely led to ground water contamination. Soil absorption and evaporation can only eliminate a certain quantity of liquid. If that quantity is exceeded, the liquid will enter and contaminate the ground water. The spray irrigated wastes also increased the ground water flow at Rocky Flats, specifically through former hazardous waste burial sites. This likely increased the rate of migration of these highly toxic wastes. (*See* Exhibit B, Attachment 1, Items 11, 15 & 16)

10. In addition, the method of spray irrigation employed by Rockwell at Rocky Flats caused the runoff of the wastes into the creeks that serviced the Great Western Reservoir and the towns surrounding Rocky Flats. Rockwell spray irrigated tremendous quantities of liquid on very limited areas regardless of temperature, precipitation or other climate factors. Because of this, the ground was unable to absorb all of the liquid and, thus, runoff of the wastes into the neighboring creeks likely occurred. This was evidenced by the erosion of the slopes at Rocky Flats which I personally observed. For example, spray irrigation of wastes onto eroded or frozen ground often causes

the wastes to run into the surface streams which flowed into lakes that supplied drinking water to residents of the towns surrounding Rocky Flats. (*See* Exhibit B, Attachment 1, Items 11 & 16)

11. I explained to Rockwell management that spray irrigation from the holding and evaporation ponds was resulting in toxic wastes being sprayed on the ground, which could contaminate the ground water and surface streams at Rocky Flats. I told management that I thought there was a better way to dispose of the waste products that Rockwell was then sprays irrigating. On December 1, 1980, I put some of my recommendations for an alternative irrigation method in writing. That document is attached as Exhibit C.

12. Rockwell management did not accept my recommendations and instead continued to spray irrigate and, in my view, contaminate the surface and ground water. I continued to voice my concerns about spray irrigation. It was my opinion that, sooner or later, the toxic wastes would find themselves in the ground water and the reservoirs downstream of Rocky Flats. I continued to be concerned with the ground water problems at Rocky Flats. Several years after my initial recommendation, on March 20, 1984, in connection with my suggestion that Rockwell retain me as a full-time engineering consultant, I stated that the ground water problems at Rocky Flats were "a latent time bomb." I attach a copy of that document as Exhibit D. My recommendations were not heeded; Rockwell continued to spray irrigate as before.

13. During the course of my work, I also learned about a third major problem which I thought affected the surface and ground water at Rocky Flats and the surrounding towns. As noted earlier, toxic industrial wastes were sent to evaporation ponds at Rocky Flats. Some of the liquid portion of these wastes either evaporated or was disposed of by spray irrigation. The remaining liquid and some solid wastes, or "sludge," remained in the ponds.

14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper manufacturing process for "pondcrete". Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (*See* Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks.

16. Rockwell also decided to use a waste mixing process similar to that proposed for pondcrete for forming "saltcrete." Saltcrete is a mixture of cement, salts and salt brine from liquid industrial waste treatment processes that is formed into large blocks. I knew from my general knowledge

of the process that, like the solid wastes being stored as ponderete, the saltcrete blocks also would have problems with deterioration. The saltcrete and other wastes were treated and stored at several sites at Rocky Flats in anticipation of being shipped off-site. (*See* Exhibit B, Attachment 1, Items 1 & 4; *see also id.*, Items 5, 6, 12, 13 & 14)

Plutonium

17. In or about 1982, I was asked to design a new exhaust "plenum" for a building at Rocky Flats which Rockwell intended to convert from a process building into an office building. A "plenum" is a duct or large chamber that collects air from the exhaust system before it leaves the building. A primary purpose of the plenum is to filter the air before it is released into the atmosphere. As part of my analysis of the proposed design for the exhaust system for this proposed new office building, I reviewed the designs and exhaust systems of other buildings at Rocky Flats.

18. While working on this project, I realized that some of the ductwork connected to the plenum was contaminated with radioactive wastes. I knew that the ductwork was over thirty years old, and deduced from that fact that numerous substances from different operations might have accumulated in the ducts. The presence of numerous toxins over the years, in my view, necessitated that the ducts be removed or cleaned. (Exhibit B, Attachment 2, Items 7, 8, 9, & 10)

19. I explained this problem to the project engineer. (Exhibit F) I also reviewed the records of the health and physics department, which confirmed my findings. (Exhibit G) I learned, however, that only the plenum, and not the ductwork, was to be cleaned. I recommended that Rockwell clean the ductwork as well. I suggested that Rockwell use new air filtration technologies, rather than replace the plenum, and use the saved money to clean the ductwork. (Exhibit H) My

suggestions were not followed. The building was designated a "clean" building and occupied for office and laboratory space, even with the contaminated ductwork.

20. I also discovered that in some buildings that were used for plutonium operations, "gloveboxes" used by employees working on plutonium and related safety features were not working properly. Plutonium is radioactive and one of the most highly toxic substances known to mankind. A "glovebox" is an enclosure into which workers place their hands to work on the processes using plutonium in the manufacture of nuclear bomb triggers. It is intended to prevent spontaneous combustion and unnecessary exposure to plutonium particles. The gloveboxes are connected through a filtered exhaust system to the ductwork which in turn is connected to the exhaust plenum. A properly functioning glovebox will, among other things, prevent over-pressurization and therefore prevent plutonium particles from entering the workplace. Gloveboxes are used at Rocky Flats because plutonium is extremely dangerous and radioactive. It is crucial to worker safety, and potentially to public safety, that the gloveboxes work properly and have adequate filters and other safety features.

21. I learned during my tenure at Rocky Flats that many of the gloveboxes being used by the workers were leaking. When this occurs, the plutonium particles enter the air and workers are unnecessarily exposed to the dangerous material. In addition, when the particles are airborne, additional plutonium may enter the exhaust ductwork that leads to the exhaust plenum. I also learned that the gloveboxes lacked necessary filters or the filters were punctured by workers trying to protect themselves because the filters were clogged from overuse and lack of maintenance. (*See* Exhibit B, Attachment 2, Items 1, 3, 5, 6, 8, 9 & 10)

22. In addition, the "dump" valves that were supposed to protect workers by maintaining the proper pressure in the gloveboxes were malfunctioning or not functioning at all.

"Dump" valves are safety devices that protect workers from exposure to plutonium particles in the event the gloveboxes malfunction. The dump valve is supposed to open when there is too much pressure in the gloveboxes. When the dump valves do not work, plutonium particles can leak into the workplace and create unnecessary hazards for workers. The malfunctioning of the dump valves also may lead to an accumulation of plutonium in the ductwork. (*See* Exhibit B, Attachment 2, Items 2, 8, 9 & 10) While at Rocky Flats, I recommended a way to prevent damage due to over-pressurization from the dump valves. (Exhibit I)

23. When I became aware of the failure of the dump valves to work properly, I reported that fact to my superior, Anthony Eden. At Mr. Eden's suggestion, we tested the dump valves. The test results confirmed that the valves were not working properly and had not been working properly for some time. (Exhibit J)

24. Perhaps most importantly, as part of my assigned projects at Rocky Flats, I concluded that the build-up of plutonium in the exhaust ducts created a danger to occupants of the building as well as to persons outside of the building. As stated earlier, I learned from my work in the various buildings that the gloveboxes, filters and dump valves were not working properly and that the equipment being used by workers was not cleaned or changed often enough. These discoveries, in my view, proved that the malfunctioning equipment and ineffective safety devices in the buildings at Rocky Flats created serious hazards. I realized that plutonium particles had likely accumulated throughout the ductwork of other Rocky Flat process buildings. (*See* Exhibit B, Items 1, 8, 9 & 10; *see also id.*, Item 4) Despite my findings, Rockwell did not, to my knowledge, undertake the necessary actions to abate these very significant hazards.

Beryllium

25. Beryllium is a unique material used in the manufacture of nuclear triggers for nuclear bombs. It is an extremely toxic metal, although it is not itself radioactive. Workers who are exposed to dangerous levels of airborne beryllium can contract the deadly lung disease berylliosis.

26. During my tenure at Rocky Flats, I was assigned to a Rockwell project team to study the health and safety conditions in the beryllium machine shop and propose solutions. I was given this assignment after an employee contracted berylliosis. As part of this assigned project, I examined the environment of the beryllium machine shop and reviewed Rockwell's compliance there with health and safety requirements. Attached as Exhibit K is a document that I prepared outlining the criteria for the design of the air handling system of the beryllium machine shop.

27. As part of this work, I learned that the workplace environment of the machine shop was contaminated with hazardous levels of beryllium both in the air and on workplace surfaces. I also learned that the systems in the shop for distributing air and for monitoring the level of beryllium exposure were not installed or functioning properly and that, therefore, Rockwell's records did not accurately reflect the excessive levels of beryllium particles in the shop. In addition, excessive levels of beryllium particles were accumulating in the wrong places in the dust collection system servicing the beryllium shops. I suggested to management that the monitoring system be corrected and that a different method of machining be employed at the shop to prevent excessive beryllium particles from entering the air. Again, my suggestions were not heeded. (*See* Exhibit B, Attachment 3, Items 1-5)

Rockwell's Contract with the
United States

28. As a Rockwell employee, I was aware that Rockwell was operating Rocky Flats under a lucrative contract with the United States. I understood then that, under its contract with the United States, Rockwell could -- and did -- earn substantial "bonuses" every six months for its operations of the plant. Indeed, periodically during my employment at Rocky Flats, I received copies of documents describing the award fee determination process under which Rockwell could earn these bonuses. I attach as Exhibit L one of the documents that I received while employed at Rocky Flats which explains part of the process.

29. I also learned during my employment at Rocky Flats that, under its contract with the United States, Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. In addition, I learned that Rockwell's compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." In fact, page 2 of Exhibit L lists those performance areas that Rockwell had to satisfy in order to receive an award fee under the contract for the period in question. I understood, based on documents like Exhibit L, that Rockwell would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

I Voluntarily Provided Information
to the Government on Matters
at Issue in This Case

30. While employed at Rocky Flats, I was told by my superiors that I should not discuss the environmental, health and safety problems that I was discovering with

representatives of the Department of Energy or any other agency of the government. I followed these instructions.

31. Soon after the termination of my employment with Rockwell in March 1986, I approached the Federal Bureau of Investigation ("FBI") about some of the environmental, health and safety problems described above as well as a number of other problems at Rocky Flats. I was introduced to FBI Special Agent Jon S. Lipsky by an acquaintance of mine, named Bonnie Exnor. I first met with Mr. Lipsky at Ms. Exnor's office in the summer or fall of 1986. At that initial meeting, I described some of the matters outlined above in addition to other matters concerning Rocky Flats that are not at issue in this case. I subsequently met on at least three other occasions with Mr. Lipsky and representatives of the Environmental Protection Agency ("EPA"), and on one occasion with an Assistant United States Attorney. I also spoke by telephone on several other occasions with Mr. Lipsky. In addition, I provided the FBI with over 2,300 pages of documents. Further, I provided the FBI with the names of individuals with likely knowledge of Rockwell's environmental, health and safety compliance activities as well as recommendations as to where at Rocky Flats the FBI might best locate additional relevant documents and other evidence.

32. To my knowledge, the FBI recorded some of our discussions. I had other discussions with the FBI that, to my knowledge, were not recorded, including my initial meeting in Ms. Exnor's office and some of my telephone conversations with Mr. Lipsky.

33. The FBI reports that I have of my discussions with representatives of the government document some, but not all, of the matters that I reported to them. I attach as Exhibit M a report by FBI Special Agent Jon S. Lipsky summarizing aspects of my June 25, 1987 meeting with Mr. Lipsky and EPA Agent William F. Smith. As that report indicates, during the June 1987 meeting I voluntarily provided

information to the government concerning a number of matters on which this lawsuit is based, including matters involving ground water contamination, waste treatment and beryllium exposure.

34. I attach as Exhibit N an FBI report of my February 17, 1988 discussion with FBI Special Agent Lipsky, EPA Agent Smith and Assistant United States Attorney Ken Fimberg. Among other things, at that meeting I discussed my safety concerns about the Rocky Flats beryllium shop and the contaminated ducts. In addition, I attach as Exhibit O further documentation by the FBI recording certain of our telephone conversations and written communications concerning matters at issue in this lawsuit.

35. All of the information that I provided to the FBI and other government representatives was based upon my direct and independent knowledge, gained while I was an engineer at Rocky Flats working on matters that are now at issue in this lawsuit. I did not obtain the information outlined in this affidavit from news reports or reports of outside government investigations. Rather, I obtained the information outlined above by personal observation and in connection with my assigned projects at Rocky Flats to analyze these problems and propose solutions. The information I possess on the matters described in this affidavit is direct and independent of any public documents or news reports.

36. In August 1986, after the termination of my employment at Rockwell, I filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado. In that complaint, which I attach as Exhibit P, I included, among other things, some of the allegations concerning Rockwell's environmental violations involving wastewater, beryllium and plutonium (pp. 6, 9) that are presently at issue in this lawsuit (*see* Exhibit B).

37. Finally, simultaneously with the filing of this lawsuit, I submitted to the government a detailed Disclosure Statement. I attach as Exhibit Q a copy of my Confidential Disclosure Statement of Material Evidence and Information. As I state in that document (pp. 9-17, 19-20, 23-30), I voluntarily provided the government with information about which I had direct and independent knowledge on the surface and ground water, plutonium and beryllium allegations in this case. As the Disclosure Statement also states (pp. 24-30), I simultaneously provided the United States with four boxes of documents about matters at issue in this case about which I have direct and independent knowledge. I continued to supplement my Disclosure Statement by providing additional documentation to the government subsequent to its filing, and prior to the unsealing of this lawsuit.

38. In my Consolidated Answers to Discovery (Exhibit B), I summarized the factual bases of my claims in this action. Based on my work history at Rockwell, as described in part above, I have direct, independent and personal knowledge of the facts underlying each of the environmental, health and safety problems set forth in my Consolidated Answers. The material outlined in this affidavit, however, is not all-inclusive of the matters about which I have direct, independent and personal knowledge from my employment at Rocky Flats.

Conclusion

39. For the foregoing reasons, I respectfully request that Rockwell's motion to dismiss my complaint be denied.

/s/ James S. Stone
James S. Stone

Sworn to before me this
27th day of February, 1993.

/s/ Cynthia M. Annett

Notary Public

Notary Public
Cynthia M. Annett
State of Colorado

[Exhibit C to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, Excerpt]

ENGINEERING CALCULATION SHEET **REF 12-2-0**
PROJECT NITRATE WASTE IRRIGATION **PROJECT NO. 315332**
BY JIM STONE
To: AL. KRIZNAR w/COPY TO BOB JENSON **DATE 12-1-80**
CALCULATION: **SHEET 1 OF 3**

Comments On Design Criteria:

1. The Irrigation System Should Be Located In The Area North Of The 207 Ponds & The Psz For The Following Reasons:
   a) Less energy & cost due to shorter distance between source of wastewater & disposal area.
   b) The area should be cultivated in order to utilize the existing nitrogen trapped in the subsoil & to stabilize the slopes against erosion.
   c) The area is down-grade from the ponds & can be served by gravity with a siphon system.
   d) The area is down-wind from the Rocky Flats facility.
   e) The area is not suitable for other purposes, such as future expansion of the Rocky Flats facility.
2. The Irrigation System Should Be A Gravity Fed Dispersal Trench System For The Following Reasons:
   a) The geological formation & the soil texture is suitable for a shallow trench system to disperse the wastewater into the root zone uniformly.
   b) The system can be operated year-around & is more dependable than a mechanical sprinkler system.
   c) The system has less owning & operating costs.
   d) The system is more adaptable to the unique wind conditions at Rocky Flats.
   e) The system meets the criteria established by the environmental & safeguards/security divisions.
3. References:

a) Drawing – "Nitrate Waste Irrigation #Sk-315332-Dc-1"
b) "A Supplementary Report To An Engineering Study For Water Control & Recycle Concerning The Recovery Of Nitrate Laden Groundwater" By Engineering Science, Inc.
c) "Soil Investigation (Psz)" By CTL/Thompson, Inc.
d) "20" Wind Rose Rocky Flats" By AEC
e) "Freeze Index-Use Of Climatic Data In Design Of Soils Treatment Systems, Boulder, Co." By NO & AA.
f) "Design Manual – Land Treatment" By EPA 625/1-77-008
g) "Calculations – Area Req'd" By J. Stone (SHTS. 2 & 3).

BEST AVAILABLE COPY

Stone 10-13-82

ENGINEERING ORDER

TYPE OF ACTION	REVIEW	FINAL
ENGINEERING		
EARNINGS	☐	☐
CONCEP. DEL. REPORT	☐	☐
DESIGN CRITERIA	☒	☐
REQUEST FOR DIRECTIVE	☐	☐
OTHER ( )	☐	☐
PROCUREMENT SPECS.	☐	☐
DESIGN DOC. TITLE IIII		☐
PROCUREMENT	NO	PURCH.
SPECS. AND/OR DWGS	☐	☐
CONSTRUCTION	ORIG.	ADDENDUM
ISSUE	☐	☐
FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O	☐	
OTHER ACTION SPECIFY	☐	

TYPE OF FUNDING: LI ☐ GPP ☐ GEP ☐ WPAS ☐ EXP ☒

TYPE OF CONSTRUCTION: MAINT ☐ OPF ☒ FIXED PRICE CONTACT ☐

QUALITY ASSURANCE LEVEL: I, IA, (II, IIA, OR III) (CIRCLE ONE OR MORE)

INSPECTION REQUIRED: SOURCE YES ☒ NO ☐; RECEIVING YES ☒ NO ☐; CONSTRUCTION YES ☒ NO ☐

REFER TO EO NO.

EO RELEASE DATE 10-4-82

INITIATOR: A.L. KRIENAR EXT 69-2722 DATE 9/22/82

PROJ. ENGR.: A.L. KRIENAR EXT DATE

FUNCT. MGR.: R.J. Bluge EXT. 2106 DATE 9-29-82

F.O.A.: Al Watson EXT. DATE 9/29/82

E.O. COORDINATOR: [illegible] EXT. 2526 DATE 10-1-82 3:30 PM

DISTRIBUTION

DRAWING NO	ISSUE	TITLE
27952-D01		P&ID
" -D02		P&ID
-D03		EQUIP LAYOUT
-D04		STRUCTURAL
-D05		MOTOR POWER PLAN
-D06		ONE LINE ELECT DIA.

DESCRIPTION OF DOCUMENT(S)

Design Criteria Review Package including above drawings.

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of objectives & potential alternatives.
Jim Stone 10-13-82

☐ DISTRIBUTE PMR PER PMR DISTRIBUTION LIST

☐ REQUEST FOR ESTIMATE TO COST ENGRG. ONLY

TOTAL NO. OF COPIES: 30 90 35

PLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIENAR BLDG. LAKE ARBOR BY THURSDAY OCT 14 OR BRING YOUR COMMENTS TO THE REVIEW MEETING IN ROOM Conf. Rm. BLDG. LAKE ARBOR TIME 1:00 PM DATE FRI. OCT. 15, 1982

REVIEWER'S SIGNATURE [signature] DATE 10-13-82

CHARGE NO	SUFFIX NO.
830	
E.O. NO. 7964	BLDG. NO. FAC. 207

OJ. TLE SOLAR EVAP. POND SLUDGE REMOVAL

PROJ. NO. 420906 SUB. NO — PAGE NO 1 OF 1

RP-40486 (11/81) DESTROY PREVIOUS ISSUES

276

[Exhibit E to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction]

[Exhibit L to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction]

Preliminary 3-month CPAF Rating
page 2

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we can take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. "For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. "We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award fee. The award fee is based on superior performance in the group of key Functional Performance Areas (FPAs) that DOE identifies for each 6-month CPAF evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (*see* attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

FUNCTIONAL PERFORMANCE AREAS
ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT *

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance *
Production Support *
Chemical Operations *
Technical Support
Quality Control *
Development Work
Nuclear Materials Management
Waste Management *
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security *
Nuclear Safeguards *
Facilities Engineering &
Construction Management
Facilities Maintenance, Utilities
and Energy Conservation Management *
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing *
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985.

[Exhibit Q to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, Excerpt]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1154

UNITED STATES OF AMERICA *ex rel.*,
JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION,
a corporation,

Defendant.

PLAINTIFF'S CONFIDENTIAL DISCLOSURE STATEMENT OF MATERIAL EVIDENCE AND INFORMATION

Plaintiff James S. Stone herein submits to the United States Government, pursuant 31 U.S.C. §3730(2), his written disclosure of material evidence and information. Served concurrently herewith is a copy of Mr. Stone's Complaint Under False Claims Act, which document is being filed in camera and under seal with the United States District Court for the District of Colorado. This disclosure statement is confidential.

* * *

14. Analysis of pond crete method for drainage of solar evaporation ponds. Solar evaporation ponds have, for some time, been used to treat RCRA hazardous wastes. Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds. The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, he immediately recognized that the design could not work and would lead to serious problems. For example, the system was designed to remove sludge from the pond and mix that sludge with cement in order to create blocks of "pond crete" for disposal use. Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pond crete" blocks would rapidly disintegrate thus creating additional contamination problems.

Mr. Stone's advice, which involved alternatives, was rejected and the system was built as improperly designed. As shown by the FBI's search warrant application, at page 89, this system failed on at least one occasion during 1988 when Pond 207A was being drained for mixing, in Building 778, to form "pond crete" blocks. Mr. Stone's information also led to the FBI's broader investigation of Solar Evaporation Ponds and their misuse by Rockwell.

* * *

VI. CONCLUSION

To the extent possible, the foregoing represents a statement of substantially all evidence and material information possessed by Mr. Stone. As noted in various portions of the document, some evidence is either classified, too technical, too voluminous, or otherwise not susceptible to inclusion at this time. However, Mr. Stone is ready and willing to revise and supplement his submittal of information in accordance with the Government's needs in pursuing and evaluating this matter. All communications regarding this matter should be directed through the undersigned or representatives of his law firm.

DATED: July 5th, 1989

LEEVAN & ALLEY

By /s/ Hartley David Alley
HARTLEY DAVID ALLEY
(Colo. Reg. No. 15389)
4251 Kipling Street, Suite 130
Wheat Ridge, Colorado 80033
(303) 431-8060

3345 Wilshire Blvd., Suite 1107
Los Angeles, California 90010
(213) 384-9192

Attorneys for Qui Tam and Individual
Plaintiff JAMES S. STONE

Plaintiff's Address:
158 Huntington Drive
Vicentown, NJ 08088